FILED

UNITED STATES COURT OF APPEALS

SEP 13 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

In re: APPLE PROCESSOR LITIGATION,	No. 22-16164
_____	D.C. No. 5:18-cv-00147-EJD
ANTHONY BARTLING; et al.,	
Plaintiffs-Appellants,	MEMORANDUM*
v.	
APPLE INC.,	
Defendant-Appellee.	

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Judge, Presiding

Argued and Submitted August 15, 2023
Anchorage, Alaska

Before: MURGUIA, Chief Judge, and PAEZ and NGUYEN, Circuit Judges.
Partial Dissent by Judge PAEZ.

Plaintiffs brought this class action lawsuit against Apple, Inc. ("Apple"),

alleging that Apple knew several of its products ("iDevices") were affected by two

security vulnerabilities, which could only be repaired by installing software

---

        *   This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

updates that reduced the iDevices' performance. Although Apple knew about these issues by at least June 2017, Apple continued to tout the security and performance of its iDevices and did not disclose the defects to the public until after information about the security vulnerabilities was leaked to *The New York Times* in January 2018. Plaintiffs brought claims under state consumer protection laws and for common law fraud and also sought equitable relief. The district court granted Apple's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), concluding that Plaintiffs failed to sufficiently allege violations under Rule 9(b)'s heightened pleading requirements for fraud. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (describing Rule 9(b) requirements). The court also dismissed Plaintiffs' equitable claims.

We have jurisdiction under 28 U.S.C. § 1291, and we review de novo dismissals under Rules 9(b) and 12(b)(6). *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1016 (9th Cir. 2020). At the motion to dismiss stage, "[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to Plaintiffs." *Id.* (citing *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 937 (9th Cir. 2008)). We apply state substantive law to Plaintiffs' state law claims. *Id.* (quoting *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1103 (9th Cir. 2013)).

To state a claim under the California Consumer Legal Remedies Act

("CLRA") or for fraud,[1] plaintiffs must plead three elements: a knowing

misrepresentation, reliance, and damages. *See Kearns*, 567 F.3d at 1126; *In re*

Tobacco II Cases, 207 P.3d 20, 581–82 (Cal. 2009). The misrepresentation can be

an affirmative statement or an omission. *Kearns*, 567 F.3d at 1126. Because

Plaintiffs have failed to state a claim under either approach, we affirm.

    1. Affirmative Misrepresentations. Plaintiffs allege that Apple made

affirmative misrepresentations about the security and performance of its iDevices.

We conclude that none of the alleged statements is actionable. First, the two

statements concerning security were made in May 2017. Despite passing

references to 1995 and 2012, Plaintiffs have not pled with particularity that Apple

knew about the defects before June 2017. *See Kearns*, 567 F.3d at 1124–25.

Because Plaintiffs must explain why the statement was "untrue or misleading *when*

made," *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1549 (9th Cir. 1994), the

security statements are not actionable. Second, although Plaintiffs identified

statements that Apple made about the iDevices' performance in or after June 2017,

these statements are also not actionable. Some statements, such as those that claim

the iDevices' chips are the "most powerful and smartest . . . ever," are non-

---

[1] Because Plaintiffs present the same arguments and factual bases for each state
consumer protection statutory claim and for the fraud claim, the district court
analyzed these claims together using California law. We follow the same
approach.

actionable "puff[ery]" because "no reasonable consumer would take [them] as anything more weighty than an advertising slogan." *See Consumer Advocs. v. Echostar Satellite Corp.*, 8 Cal. Rptr. 3d 22, 29 & n.3 (Ct. App. 2003) (internal quotation marks and citation omitted). Other statements are more measurable and definitive, claiming that the new iDevices are certain percentages faster than prior generations, but Plaintiffs have not specifically alleged that Apple's comparative statements were false. We thus affirm the district court's conclusion that Plaintiffs failed to plead with particularity any actionable affirmative misrepresentations.

2. Omissions. Plaintiffs next allege that Apple's failure to disclose the defects was actionable as an omission. Even assuming an omission occurred, however, Plaintiffs failed to demonstrate reliance on the alleged omission. To do so, they needed to "simply prov[e] 'that, had the omitted information been disclosed, [they] would have been aware of it and behaved differently." *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1224 (9th Cir. 2015) (quoting *Mirkin v. Wasserman*, 858 P.2d 568, 574 (Cal. 1993)). While Plaintiffs have alleged that they would have behaved differently had Apple disclosed the defects, they have not sufficiently alleged that they would have been aware of any disclosure. Although Plaintiffs allege that Apple "disseminated widely" information from its headquarters and that the defects were "widely reported" once *The New York Times* learned about the security vulnerabilities, the complaint does not contain

allegations that Plaintiffs themselves were likely to encounter the news reports or to read Apple's press releases. *See Daniel*, 806 F.3d at 1226–27 (concluding plaintiffs demonstrated probable awareness because they "presented evidence that they interacted with and received information from" the sources through which defendant would have disclosed a defect). The district court thus correctly concluded that Plaintiffs failed to state an omission-based claim.

3. Equitable Claims. Plaintiffs also assert claims for restitution, injunctive relief, and unjust enrichment under the CLRA and California's Unfair Competition Law ("UCL"). The district court dismissed these claims under *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020), which held that federal courts must apply federal equitable principles to state-based equitable claims, such that a plaintiff "must establish that she lacks an adequate remedy at law before securing equitable restitution for past harm under the UCL and CLRA." *Id.* at 844. Plaintiffs attempt to cabin *Sonner* to its facts, but subsequent case law has made clear that "*Sonner*'s holding applies to equitable UCL claims when there is a viable CLRA damages claim, regardless of" the facts. *Guzman v. Polaris Indus. Inc.*, 49 F.4th 1308, 1312 (9th Cir. 2022). Thus, Plaintiffs were obligated to allege that they had no adequate legal remedy in order to state a claim for equitable relief, *see Sonner*, 971 F.3d at 844, and they have "fail[ed] to explain" how the money they seek through restitution is any different than the money they seek as damages, *id.*

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.